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# STRIKES, PICKETING AND JOB ACTIONS BY PUBLIC EMPLOYEES

CHARLES C. MULCAHY\* AND STEVEN H. SCHWEPPE\*\*

## INTRODUCTION

Recent years have seen a growth in militancy among public employee unions. This militancy has been reflected in an increased willingness to pursue various job actions, including slow downs, refusal to work overtime, picketing and strikes, when union demands are not resolved. Public employers faced with these tactics for the first time are often surprised and unable to cope with the situation. This problem arises at a time when many municipal employers are faced with genuine budget problems. Even where municipal budget problems are not acute, municipal management often becomes enmeshed in political processes that are incompatible with efficiency of operation. When municipal managers attempt to strengthen operational efficiencies, problems develop frequently with public employees who are unwilling to accept change.<sup>1</sup> Necessary increased productivity changes must be implemented, but municipal management must also be prepared to face the consequences.

Public employers must educate themselves concerning the type of job actions, pressure tactics and other tools which a public employee union may use against them. An awareness of potential problems and potential remedies will go far in insuring the municipal employer a safe and reasonable settlement of the dispute. This article will attempt to summarize some of the pressure tactics used by public employees and their unions and outline some of the remedies available to the municipal employer.

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1. WIS. STAT. § 111.70(4)L (1973).

### A. *Picketing*

Picketing is a well established tool for influencing government decisions by arousing public awareness and concern. It is also a well established union pressure tactic. Public employee unions will use picketing both to arouse public sympathy and to support a strike or job action.

Informational picketing is designed to draw public attention to a dispute or complaint. A public employee union will use this type of picketing for a wide variety of goals, many of which have little or nothing to do with collective bargaining. Government decisions regarding the budget, lay-offs, work assignments, equipment purchases and a wide range of other actions may draw informational pickets. Since government buildings are frequently located near major roads and commercial areas, such picketing will attract the attention of many citizens as well as the media. Private sector unions may also join in the picketing and picketing may be accompanied by person-to-person contact with the electorate. Unless the public employer is prepared to meet the questions raised by the pickets with sound explanations and a thorough plan to attract the public's attention, the interest drawn by informational picketing can result in heavy public pressures to concede.

Where informational picketing alone is unsuccessful in drawing the attention and political pressure desired by the union, a sit-in or other exercise of civil disobedience may be employed. Again, the objective will be to draw a maximum amount of media coverage and public interest. The union's chief objectives will be to spread its message to the electorate and create political tensions within the ranks of elected officials.

Frequently, informational picketing is combined with some type of job action. Large-scale picketing is often associated with a full-scale walk-out. In many instances, pickets may be the employer's only advance notice that a strike will occur. Slow-downs, sabotage and other disruptive tactics may be combined with picketing in efforts to apply even greater pressure upon the public official. Even where picketing remains informational only, discipline and production problems may arise. The distraction of the pickets may limit the productivity of other public employees and may cause an increase in absenteeism. Morale within the department will drop, and time may be lost in discussions and arguments. The public employer

must be prepared to meet these side effects from informational picketing with disciplinary measures when required.

### 1. Limiting the Scope of Picketing

Any discussion of peaceful picketing and the law must begin with the premise that "peaceful" picketing carried on in a location generally open to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment.<sup>2</sup> It is well established that peaceful picketing has elements of speech connected with it and, therefore, carries with it some First and Fourteenth Amendment protections.<sup>3</sup> In public sector labor disputes, the First Amendment rights of assembly and speech are joined by the right to petition elected officials.

Picketing, however, carries with it elements of conduct and, as such, is subject to stricter regulations than pure speech.<sup>4</sup> In this regard, the United States Supreme Court has stated:

. . . [T]his Court has noted that picketing involved elements of both speech and conduct, i.e., patrolling and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subject to controls that would not be constitutionally permissible in the case of 'pure speech'.<sup>5</sup>

Among the controls which governments can impose on picketing are restrictions on its subject and location.

Numerous courts have ruled that peaceful picketing by public employees in support of an illegal strike is illegal picketing and enjoined.<sup>6</sup> These courts have based their rulings on a

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2. *Amalgamated Food Employees Union Local No. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

3. *Thornhill v. Alabama*, 310 U.S. 88 (1940); *AFL v. Swing*, 312 U.S. 321 (1941); *Bakery Drivers Local 802 v. Wohl*, 315 U.S. 769 (1942); *City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1970).

4. *Amalgamated Food Employees Union Local No. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *International Brotherhood of Teamsters Local 695, AFL v. Voght, Inc.*, 354 U.S. 284 (1957); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Bakery Drivers Local 802 v. Wohl*, 315 U.S. 769 (1942).

5. *Amalgamated Food Employees Union Local No. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 (1968).

6. *University of Wisconsin v. The Teaching Assistants Association*, Civil No. 130-095 (Dane County Circuit Court - 1970), 74 LRRM 2052; *Board of Education v. Redding*, 32 Ill. 2d 567, 207 N.E.2d 427 (1965); *Kulish v. Policemen's Benevolent Association*, N.J. Superior Court Chancery Division, (Union County No. C-3444-72, 1973), 84 LRRM 2143; *Los Angeles v. Los Angeles Building and Construction Trades Council*,

series of United States Supreme Court decisions holding that governments can legitimately prohibit picketing which is in furtherance of illegal objectives.<sup>7</sup> In summarizing its decisions, the United States Supreme Court stated:

This series of cases, then, established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy.<sup>8</sup>

In *Giboney v. Empire Storage & Ice Co.*<sup>9</sup> union picketing to force an employer to deal with only union peddlers was enjoined by the Missouri Supreme Court on the grounds that the objective of the picketing was an agreement in violation of state anti-trust laws. In upholding the injunction, the United States Supreme Court found that the basic question was whether the state's statutorily established anti-trust regulation or the union's demand for a monopoly would be obeyed by the company. The Court ruled that the state's power was preeminent, even though the union's efforts at monopoly were inseparable from any First Amendment protection for its picketing. Similar reasoning was followed by the Court in *Hughes v. Superior Court*,<sup>10</sup> and *Plumbers Union v. Graham*.<sup>11</sup>

In *Building Services Union v. Gazzam*,<sup>12</sup> a union's recognition picketing was enjoined by a state court on grounds that it coerced the employer into signing a collective bargaining agreement without allowing employees the statutory right to choose their bargaining representative. In upholding the injunction, the United States Supreme Court stated:

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94 Cal. App. 2d 36, 210 P.2d 305 (1949); *Delaware River and Bay Authority v. International Organization of Masters, Mates and Pilots*, 45 N.J. 138, 211 A.2d 789 (1965); *City of Minot v. Drivers Union*, 142 N.W.2d 612 (N.D. 1966); *State v. Heath*, 117 N.W.2d 751 (N.D. 1970); *Trustees of California State College v. Local 1352 San Francisco State College Fed'n of Teachers*, 13 Cal. App. 3d 863, 92 Cal. Rptr. 134 (1970); *City of Alcoa v. International Brotherhood of Electrical Workers*, 203 Tenn. 12, 308 S.W.2d 476 (1957).

7. *International Brotherhood of Teamsters Local No. 695, AFL v. Voght, Inc.*, 354 U.S. 284 (1957); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Building Services Union v. Gazzam*, 339 U.S. 532 (1950); *Plumbers Union v. Graham*, 345 U.S. 192 (1953).

8. *International Brotherhood of Teamsters Local No. 695, AFL v. Voght Inc.*, 354 U.S. 284, 293 (1957).

9. 336 U.S. 490 (1949).

10. 339 U.S. 460 (1950).

11. 345 U.S. 192 (1953).

12. 339 U.S. 532 (1950).

An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative. Peaceful picketing for any lawful purpose is not prohibited by the decree under review.<sup>13</sup>

The application of these cases to public employee picketing in support of a strike is clear. An important objective of picketing is the discouraging effect it has on other employees who may wish to cross picket lines. The coerciveness of the picket line will cause employees to abandon their jobs and join the strike. Thus, as in *Giboney*, the effects of such picketing will be the growth of an activity—the public employee strike—prohibited by statutory and common law. As discussed in *Gassam*, such picketing is for an illegal purpose, the maintaining of an illegal strike.

It is important to note that the right to enjoin public employees picketing is limited to picketing in support of an illegal strike. Picketing which is solely informational could not be enjoined in this manner.<sup>14</sup> Such picketing would be less coercive and would be more directly related to the right of speech, assembly and petition. While such picketing is likely to create serious political problems in the community, it would be enjoinable only if the pickets created disruptions serious enough to overcome First and Fourteenth Amendment protections granted to speech, assembly and petition.<sup>15</sup>

Where informational picketing occurs or where a complete injunction is not desirable partial injunctive relief may be available. Injunctive relief is constitutionally available to end violent picketing or picketing which is part of a violent pattern of events.<sup>16</sup> Occasional acts of violence are not, however, sufficient to justify an injunction.<sup>17</sup> Mass picketing which denies ingress and egress from buildings is also subject to injunction.<sup>18</sup> In both cases of mass picketing and violence, the action enjoined is conduct and not speech.

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13. *Id.* at 539.

14. *University of Wisconsin v. The Teaching Assistants Association*, 74 LRRM 2052 (1970). *Rockford v. Local 413 Firefighters*, 98 Ill. App. 2d 36, 240 N.E.2d 705 (1968).

15. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

16. *Milkwagon Drivers Local 753 v. Meadowmor Dairies, Inc.*, 312 U.S. 287 (1941); *Hotel & Restaurant Employees International Alliance v. WERB*, 315 U.S. 432 (1942). See also *Youngdahl v. Rainfaire, Inc.*, 355 U.S. 131 (1957) and 48 Am. Jur. 2d § 1390.

17. *Milkwagon Drivers Local 753 v. Meadowmor Dairies, Inc.*, 312 U.S. 287 (1941).

18. *Hotel & Restaurant Employees International Alliance v. WERB*, 315 U.S. 432 (1942). *Cameron v. Johnson*, 390 U.S. 611 (1968).

In other cases, criminal sanctions can be applied. Disorderly conduct and unlawful assembly statutes have been used to restrict picketing.<sup>19</sup> Furthermore, under Wisconsin Statutes section 134.03,<sup>20</sup> persons threatening, intimidating, or coercing other persons from working may be fined or imprisoned. Finally, where picketing occurs outside the context of collective bargaining or union representation, it may be illegal under Wisconsin Statutes section 103.535.<sup>21</sup>

## 2. Limiting the Location of Picketing

Even if the public employer decides not to enjoin picketing by public employees, it may need to restrict the location of such picketing. The union may choose to picket homes, private business, the city hall, or wherever it will receive attention and create harassment. Picketing of residential areas can be prohibited by narrowly drawn ordinances.<sup>22</sup> In *Wauwatosa v. King*,<sup>23</sup> the Wisconsin Supreme Court upheld such an ordinance where school custodial, maintenance and cafeteria employees who were also public employees were picketing the homes of school board members. In its decision, the supreme court emphasized the right of the state to maintain the privacy

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19. *State v. Perry*, 196 Minn. 481, 265 N.W. 302 (1936); *State v. Cooper*, 205 Minn. 333, 288 N.W. 903 (1939).

20. WIS. STAT. § 134.03 (1973) provides:

**Preventing pursuit of work.** Any person who by threats, intimidation, force or coercion of any kind shall hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as a wage worker, or who shall attempt to so hinder or prevent shall be punished by fine not exceeding \$100 or by imprisonment in the county jail not more than 6 months, or by both fine and imprisonment in the discretion of the court. Nothing herein contained shall be construed to prohibit any person or persons off of the premises of such lawful work or employment from recommending, advising or persuading others by peaceful means to refrain from working at a place where a strike or lockout is in progress.

21. WIS. STAT. § 103.535 (1973) provides:

**Unlawful conduct in labor controversies.** It shall be unlawful for anyone to picket, to induce others to picket, the establishment, employes, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business, or interfere with any person or persons desiring to transact or transacting business with him, when no labor dispute, as defined in subsection (3) of section 103.62, exists between such employer and his employes or their representatives.

22. *City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1970); *City of Brookfield v. Groppi*, 50 Wis. 2d 166, 184 N.W.2d 96 (1970).

23. *City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1970). See also Appendix A, *infra*.

and tranquility of the home. Picketing of business establishments unrelated to the labor dispute may also be enjoined.<sup>24</sup> Such picketing most commonly involves picketing of city council, school board or county board members' businesses or places of employment. The likely effects of such picketing will vary from a near total boycott of the business in strong labor communities to minor harassment of clients and customers. In any case, this form of picketing will place direct economic and social pressures upon the elected official.

Picketing of publicly owned property may also be restricted where valid reasons exist for the restriction. The need for quiet in courthouse, hospital and library areas may justify such restrictions,<sup>25</sup> as may the need for security in and around jail-houses.<sup>26</sup> Ingress and egress to public buildings may be maintained by injunction.<sup>27</sup> Ordinances restricting picketing of public buildings must, however, be narrowly drawn and must be supported by substantial state interests.

### 3. Protection of Persons and Property

To avoid personal injuries and property damage as a result of picketing, the public employer must establish a thorough and detailed plan. This will require a complete briefing of law enforcement and fire protection personnel to coordinate responsibilities. Among matters which should be discussed at this briefing are:

- 1) Control of sabotage and vandalism;
- 2) Traffic safety in the area being picketed;
- 3) Arrest procedures;
- 4) Techniques to be used in maintaining ingress and egress to public buildings.

Less experienced law enforcement personnel should be briefed on arrest procedures and the necessity for remaining neutral on the issues causing the picketing. Such personnel may also require briefing on the rights of pickets vis-a-vis the government and general public.<sup>28</sup>

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24. *Carpenters & Joiners Union v. Ritters Cafe*, 315 U.S. 722 (1942); *Kulish v. Policemen's Benevolent Association*, 84 LRRM 2143 (1973).

25. *Cox v. Louisiana*, 37 U.S. 536 (1965); *Gregory v. City of Chicago*, 394 U.S. 111, 118 (1969) (concurring opinion).

26. *Adderly v. Florida*, 385 U.S. 39 (1966).

27. *Cameron v. Johnson*, 390 U.S. 611 (1968).

28. For a more thorough discussion of law enforcement's role in public employee



#### 4. Public Relations

The public will expect answers to its questions as to what caused the picketing. To meet the expectation, the employer should be prepared to "sell" its position to the public. Unless the employer seeks to publicize its position, the public will receive only the information given it by the union. This will result in a misunderstanding of the issues and may lead public opinion to the conclusion that management is acting irrationally or in bad faith. Once public opinion rides with the union, management will find itself under increasing pressure to settle, regardless of the long term consequences. The labor dispute will become a political football to be settled by political pressures rather than by the give and take of negotiations.

Among the information which public employers often release to combat union publicity is data comparing the picketing employees with other public and private employees, data showing the real cost of the employees' wage demands and data showing the effects of the union's demands on taxes and upon the budget. The employer's presentation should be reduced to the point where the difference between the parties is clear. Issues which are not presented quickly and clearly to the public will not be understood and may give rise to suspicions that the employer is not seriously seeking an agreement.

Frequently, the employer's public information campaign is carried out through press releases and interviews. Speeches before civic organizations may be an equally effective tool. In some cases, public employers have purchased ads in local newspapers to insure that the issues are correctly presented and emphasized. Public information campaigns can extend to striking employees as well. While the employer must avoid bargaining individually with employees, it is allowed to present its offer to the employees and to inform them of differences between the union's and employer's positions. The employer should offer only that which has first been offered to and rejected by the union. A letter stating what the employer's last offer is and the reasons for the offer will give employees a clearer view of the differences between the union and employer. Such letters should be drafted with great care since the union will view them as a deliberate attempt to undermine its

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strikes, see *MOBERLY AND MULCAHY, PUBLIC EMPLOYMENT LABOR RELATIONS*, (State Bar of Wisconsin, 1974), pp. 123-136.

position and will be ready to challenge the letters in a prohibited practice charge if improper overtures to employees are made. Communications to employees may be especially valuable where the continuance of the labor dispute is based upon the union's unreasonable expectations.

### *B. Partial Strikes and Job Actions*

Partial strikes and job actions often accompany informational picketing. In fact, such picketing often is an attempt to highlight the existence of a partial strike. Substantial amounts of pressure, either real or imagined, can be placed on a municipal employer through the use of the partial strike or job action. Partial strikes or job actions can be defined as purposeful refusals by employees to perform certain assigned tasks or to reach the expected levels of productivity. These actions can create serious operating difficulties. Partial strikes or job actions can be divided into four classifications:

- 1) Slowdowns;
- 2) The "blue flue" syndrome;
- 3) The "quickie" strike;
- 4) Selective job actions such as refusal to perform assigned tasks.

#### **1. Job Slowdowns**

The job slowdown occurs when employees purposely fail to maintain their productivity. In order to support their demands, employees perform less work for the same pay. Examples of slowdowns in the public sector are well illustrated in street and highway departments. Refuse collectors may fail to complete their garbage runs, thus allowing garbage to accumulate to unpleasant and/or unsafe levels. Highway crews may slow down repair or snow removal assignments, causing inconvenience to motorists. Employees may perform work so poorly that projects must be redone with resulting waste of material and time.

Similar to the slowdown is the ticket writing "speedup" campaign employed by law enforcement personnel. Suddenly police or deputies will rigidly enforce selected laws. The employees deliberately fail to use discretion in the enforcement of the law. Obsolete laws which have been ignored for years may be vigorously enforced while more serious law enforcement problems are ignored. Other violations such as jaywalking, lit-

tering and minor traffic and speeding violations may be strictly enforced.

The slowdown or speedup tactic offers several advantages to the union. Most significant is that employees suffer no loss of income. Regardless of their productivity, they continue to receive their normal hourly rate of pay. Since employees engaged in the slowdown suffer no economic consequences, wide acceptance of and compliance with union strategy may be expected. In some instances, the slowdown may even increase employee earnings; an unprepared employer may counter a slowdown by ordering overtime work. Normally, an employer should not pay a premium for work which should have been done during normal working hours.

A slowdown such as occurs in highway and street departments requires no affirmative action by employees. Employees are only asked to work slower and relax. Slowdown activities are easily justified in the minds of the employees who frequently feel that by slowing down they are providing only a level of services commensurate with the level of wages offered by the employer. Employees confronted with discipline for a slowdown frequently design convincing justifications for their conduct. Reports of equipment breakdown or material shortages will increase as employees attempt to protect themselves from possible disciplinary procedures.

## 2. "Blue Flu"

Like the slowdown, the "blue flu" tactic seeks to maximize the harassment effect of the strike while limiting the economic cost to the employee. The "blue flu" tactic involves the massive, organized use of sick leave by employees. Because they utilize paid sick leave, employees do not lose wages. A primary consequence of the "blue flu" tactic is a loss of management's ability to direct the work force. The "blue flu" places pressure upon the supervisory staff by making scheduling extremely difficult and unpredictable.

## 3. "Quickie" Strike

The "quickie" strike occurs when employees refuse, without warning, to perform certain tasks. Employees may simply sit down on the job, thus obstructing other employees. Union meetings may be called during working hours or during important rush periods. Each of these methods is aimed at making

it impossible for the employer to properly manage the work force and achieve production goals.

#### 4. Selective Job Actions

The union may also call a selective strike in which employees on certain key jobs strike while others continue to perform their customary non-essential work. Employees may refuse to perform emergency work and may refuse to perform any work except that work specially assigned them. Similarly, employees may refuse to perform certain important parts of their work, thus disrupting the employer's entire program. In other cases, only those employees with specific essential skills will strike. In the school area, for example, the union may choose to strike only with its shop teachers or a similar group of specialized personnel. Because such personnel are not easily replaced on short notice, the employer's entire educational program is disrupted with minimum economic consequence to the union. The unpredictability of a selective job action makes it particularly difficult to control. The cost of replacement and overtime will, as in other forms of partial strikes, be substantial.

An especially serious form of selective job action is sabotage. Sabotage may consist of either the destruction of the employer's property or the misuse of property. Employees may fail to maintain their equipment, thus causing damage to expensive equipment. Parts may be removed from machinery making it inoperable, and keys may be hidden. If equipment is left unharmed, the work may be done so poorly that it is of little value to the employer. A less wasteful but equally serious form of sabotage occurs where, through the misuse of equipment, employees avoid doing any work whatsoever. An example of this may be found in the case of courthouse or social workers who tie up phone lines thus making it impossible for clients to receive services.

#### C. *Full Scale Strikes*

Of the variety of job actions, a full scale strike by public employees poses the greatest threat to the public health, safety and welfare. Its greater duration, pressure and threat to community harmony and safety require that the employer meet the strike's problems correctly. As in the case of other job actions, advance planning is essential. Such planning requires a knowledge of the alternatives available to the employer at each stage of the strike.

The alternatives available to the employer run the gamut from closing down operations to hiring permanent replacements. Local conditions, the nature of the services, and the impact on the community will serve as guidelines in choosing one alternative over the others.

#### *D. The Response of Public Management*

Public management must be prepared to cope with strikes, picketing and job actions by public employees. Each of the potential problem areas must be evaluated and specific plans formulated to insure continuation of public services.

##### 1. Reaction to the Partial Strike

Partial strikes are aimed at pressuring the supervisory staff, the public employer and the public in general. To be successful, a partial strike must be disruptive enough to draw public attention or cripple essential services. Any plan to meet the partial strike must be aimed at reducing this harassment and maintaining essential services at the highest possible level. Planning is essential in meeting partial strikes. In the event of slowdowns, "blue flu" or refusals to perform assigned tasks, scheduling is an especially important management tool. Management should review the services performed and decide which services are essential. Essential services should be scheduled so as to allow adequate time and personnel for their completion. Items with less priority will need to be postponed until a full staff is available or until essential tasks have been completed.

During any job action, the employer should employ the same disciplinary actions which would be employed under normal working conditions. Under normal circumstances, most employers have means for handling excessive absenteeism, abuse of sick leave or failure to meet production goals. When a job action occurs during the term of a collective bargaining agreement, a comprehensive no-strike clause in the agreement will provide additional and more reliable grounds for discipline. No-strike clauses may specifically prohibit refusals to work overtime, refusals to cross picket lines, slowdowns or mass sick leaves.<sup>29</sup> Frequently, a no-strike clause is the *quid pro quo*

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29. Illustrative of a thorough no-strike clause is the following:

**Strike Prohibited.** Neither the Union nor any officers, agents or employees will

for a grievance and arbitration procedure. With the right to have grievances arbitrated, the legitimate need for job actions during the term of the agreement is eliminated. Arbitration insures employees that their complaints will be heard and determined by their merits. Although public sector strikes may be illegal, a no-strike clause remains valuable in deterring job actions and in forewarning employees that such tactics are unquestionably in violation of the contract.

The fact that absenteeism and poor workmanship is sponsored by the union should not affect the employer's use of progressive discipline. Written reprimands, suspension and finally termination for violations of work rules and standards remain valid disciplinary methods. The need for effective work rules is especially apparent in the case of sabotage. Without rules specifically prohibiting potentially harassing conduct, an employee may defeat disciplinary actions by claiming ignorance. Work rules should include specific requirements as to maintenance and job performance which can be used against job actions designed at waste and equipment misuse. Where work rules are inadequate to meet a job action, the employer may be required to issue new rules and to properly notify all employees of the additional requirements.

An employer using disciplinary procedures to meet the partial strike must be careful to avoid discrimination based upon union membership. Discipline must be uniformly applied to both the hostile union leadership and to the less involved employee. Finally, work rules must be known by the employees. The employer should not begin to impose heavy penalties for activities it has always tolerated or ignored. Sudden and extreme changes in work rules and their enforcement may expose the employer to a prohibited practice charge for interfering with the union's right to bargain collectively.<sup>30</sup> If discipline is calmly and rationally imposed, however, the public employer's decision to discipline will either cause employees to end the partial strike or face temporary or permanent loss of income. It must be remembered that discipline is only one means of

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instigate, promote, encourage, sponsor, engage in or condone any strike, picketing, slowdown, refusal to work overtime, concerted work stoppage or any other intentional interruption of work during the term of this Agreement.

No-strike clauses may also include specific penalties or damages to be imposed upon the striking union.

30. Wis. STAT. § 111.70(3)(a) (1973).

ending the partial strike and achieving a settlement. Where it will not achieve those ends, alternatives should be considered. In some cases, discipline may be counterproductive by creating a new and different issue for collective bargaining—amnesty for disciplined employees. At that point, the employer may be caught in the dilemma of either weakening the future deterrent effect of discipline by giving amnesty or of rejecting an otherwise acceptable settlement offer containing amnesty.

As an alternative to disciplinary actions, public employers can meet the job action by retaining private contractors or by locking out employees. The use of private contractors to finish projects not completed by public employees adds expense but insures that essential projects will be finished and finished correctly. In serious cases of partial strikes, the effectiveness of the public employer's operations may be so reduced that no useful work is being completed. In such cases, a lockout will put the economic burden of a strike on the employees. A lockout may, however, cause the public to place blame on the employer for the inconvenience of the strike-lockout and for the failure to reach a settlement.

## 2. Legal Remedies to Partial Strikes

In the private sector, employers have been upheld for taking disciplinary measures, including discharge, against employees engaged in slowdowns or partial strikes.<sup>31</sup> It is generally held that employees have no right to continue working on their own terms while rejecting the employer's quality and productivity standards. This rationale has supported discharges of employees engaged in job slowdowns. In the private sector, even selective discharges designed to provide an example to employees engaged in slowdowns have been upheld so long as no discriminatory motive exists.<sup>32</sup> Private sector decisions have also held that "quickie" strikes and refusals to perform overtime assignments may be grounds for discipline and discharge.<sup>33</sup> The general rationale behind these cases is that employees cannot pen-

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31. *Elk Lumber Co.*, 91 NLRB 333, 25 LRRM 1493 (1950); *Raleigh Water Heater Mfg. Co.*, 136 NLRB 76, 49 LRRM 1708 (1962).

32. *California Cotton Cooperative Assn.*, 110 NLRB 1494, 35 LRRM 1390 (1954).

33. *Scott Lumber Co., Inc.*, 117 NLRB 1790, 40 LRRM 1086; *Honolulu Rapid Transit Co.*, 110 NLRB 1806, 35 LRRM 1305 (1954); *Valley City Furniture Co.*, 110 NLRB 1589, 35 LRRM 1265 (1954), enforced 230 F.2d 947, 36 LRRM 2740 (6th Cir. 1956); *Pacific Telephone and Telegraph*, 107 NLRB 1547, 33 LRRM 1433 (1954).

alize their employer by strike tactics while maintaining their pay status.

The Wisconsin Employment Relations Commission has held that partial strikes are not protected activities under Wisconsin Statutes section 111.70(3)<sup>34</sup> and employees engaged in them are not immune from discipline. In *Kenosha Education Association*,<sup>35</sup> the commissioner discussed the partial strike and adopted the reasoning that a partial strike was an unprotected attempt by employees to unilaterally set wages and conditions of employment. The commission asserted that even in the event of a prohibited practice by the employer, a partial strike would not be protected.

The *Kenosha* case dealt with an open house and promotional program annually conducted by teachers. The labor agreement between the board and teachers did not, however, include the program among the extra-curricular activities of a teacher. Relying on past practices, the commission held that it was mutually accepted that participation in the open house was not purely voluntary and therefore the concerted refusal to participate was a strike as much as any strike that occurs when there is no labor agreement in effect. In reaching this conclusion, the commission drew a clear distinction between voluntary and required activities, indicating that a refusal to participate in strictly voluntary activities would be protected activity.<sup>36</sup>

In the case of *DeForest Area School District No. 10*,<sup>37</sup> the commission indicated that the "quickie" strike might also be unprotected activity. The teacher involved in the case left the school to attend a teachers' association convention. In his defense, the teacher cited alleged prohibited practices committed by the employer and claimed his conduct was in protest of those actions. The commission found that the teacher could be disciplined.

While a partial strike may not be protected activity, the union may file prohibited practices charges against the public employer who used discipline in such instances. The grounds for such charges would be interference with union collective

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34. WIS. STAT. § 111.70(3) (1973).

35. *Kenosha Education Assoc.*, WERC Dec. No. 10752-A (10/72).

36. *See* Wisconsin Department of Health and Social Services of Correction, WERC Dec. No. 8892.

37. *DeForest Area School District No. 10*, WERC Dec. No. 11492 (12/73).



bargaining tactics or discrimination against union members. It would appear from the above cases that the commission would be unlikely to find such a prohibited practice in the absence of strong evidence that the discipline was for some reason other than the partial strike. Where selective discipline has been imposed and no attempt at progressive discipline has been made, a charge of discrimination would appear to be much stronger.

Besides the commission's procedures, employees disciplined for partial strikes may have contractual remedies. These include the just cause standard for discipline. The contract's arbitration procedures may also be available. Where a contract is in effect, where the terms of the agreement have been extended pending agreement on a new contract, or where contract terms are made retroactive, these remedies are available to the disciplined employee. Where, however, the contract has expired and agreement on a grievance procedure has not been reached, there exists case law to the effect that the employee has no grievance rights.<sup>38</sup> Some authorities suggest that the employer may be required to bargain with the union concerning whatever disciplinary action is taken.<sup>39</sup> The need for a record of progressive discipline, uniform enforcement of work rules, and thorough written documentation of work rule violations and well known work rules is necessary in arbitration.

While slowdowns and quickie strikes are unprotected under Wisconsin Statutes section 111.70(2), Wisconsin case law indicates that they may not be strikes for purposes of the strike prohibition found in Wisconsin Statutes section 111.70(4)(1).<sup>40</sup> In *UAW v. Wisconsin Employment Relations Board*,<sup>41</sup> the Wisconsin Supreme Court held that a series of quickie strikes was not a "strike" for purposes of Wisconsin Statutes section 111.06(2)(h).<sup>42</sup> Under section 111.06(2)(h),

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38. See ELKOURI AND ELKOURI, *HOW ARBITRATION WORKS*, (3rd Ed., 1973) pp. 66-67 and cases cited therein. *United Parcel Service Inc.*, 55 LA 443 (Forsythe, 1970); *Teamsters v. Kroger*, 411 F.2d 1191 (3rd Cir. 1969). In *Racine Education Association v. United School District No. 1*, WERC Dec. No. 11315-D (1-74) the Wisconsin Employment Relations Commission stated in dictum that an employer was not obligated to arbitrate a grievance arising during the period between expiration of the employer contract and the effective date of the successor agreement.

39. *Hilton-Davis Chemical Co.*, 185 NLRB 241, 75 LRRM 1036 (1970); *Taft Broadcasting Co.*, 185 NLRB 202, 75 LRRM 1076 (1970).

40. WIS. STAT. § 111.70 (1973).

41. 250 Wis. 550, 27 N.W.2d 875 (1947).

42. WIS. STAT. § 111.06(2)(h) (1973).

employees were prohibited from interfering with production "except by leaving the premises in an orderly manner for the purpose of going on strike." The court turned to a definition of strike found in Wisconsin Statutes section 103.43(1)(a) which provided that a strike exists so long as "unemployment on the part of the workers affected continues."<sup>43</sup> The court held that in the event of a quickie strike, no unemployment resulted and certainly no continuous unemployment. While in a future case the court might accept a new definition of "strike" which would include job actions,<sup>44</sup> the definition applied in the *UAW* case may limit access to injunctive relief against partial strikes. From a practical standpoint, this type of activity is completed before injunctive relief can be obtained in the courts.

### 3. Discontinuing Services

The simplest alternative available to the employer is to close down operations completely. This tactic will avoid some of the conflict and hard feelings generated by stronger responses. Settlement may occur earlier if public pressure to resume services forces concessions from the public employees. In some situations, the employer has little choice but to use this strategy. Where highly skilled or professional employees leave their work, it may be impossible to use supervisors, private contractors or replacements. In other cases, supervisory personnel are themselves unionized and will refuse to cooperate with the employer. Unless the employer has a strong no-strike clause in the supervisory unit contract, services will be terminated. Few public services are, however, so unnecessary that they can be discontinued indefinitely without serious consequences. Furthermore, most strike issues are so important that management cannot afford to surrender. If surrender is to be avoided, management should maintain an active response to the strike.

### 4. Maintaining Essential Services

In many cases, the essential tasks performed by public employees can be temporarily performed by supervisory personnel and non-striking employees. While much of the paperwork and followup activities will be postponed, the essential core of the operations can be continued in this manner. In

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43. WIS. STAT. § 103.43(1)(a) (1973).

44. *Oefflein v. State*, 177 Wis. 394, 188 N.W. 633 (1922).

social services departments, for example, supervisory staff with the aid of a few cooperating employees can often handle the benefit programs. While counseling and other worthwhile activities may be postponed, the basic functions of the department can be maintained. In some circumstances, the public itself can, with a minimum of hardship, greatly lessen the burden of a strike. Homeowners may be requested to carry garbage to the street rather than placing it at the back door for pickup. By making non-striking employees more productive, such minimal public efforts will lessen the strike's effects. At the strike's end such temporary changes may become permanent and result in long term productivity gains. In more serious sanitation strikes, it may be necessary to provide central dumping areas or require citizens themselves to carry garbage to a landfill site. Each of these alternatives will lessen the strike's effectiveness by reducing the threat to public health and welfare.

Often a proportion of the employees in the bargaining unit will cross the union's picket lines. Their efforts will release the pressure on supervisory personnel and will broaden the range of services that can be continued. By breaking ranks with the union, these employees expose themselves to personal attacks by union adherents. During the strike, extra precautions must be taken to protect the employees' property, homes and families. Where union picketers are violent, this protection may extend to the provision of food and bedding at the job site. After the strike, it may be necessary to separate these employees from the strikers so as to avoid harassment and confrontation.

Special consideration must also be given to the wages and benefits paid the non-striking employees. In the private sector it is an unfair labor practice to offer non-striking employees higher wages and benefits than offered striking employees.<sup>45</sup> After an impasse, the employer may make a final offer to the union and begin to provide the benefits of that offer to all returning employees.<sup>46</sup> The offer must be the same offer made to the union and must be made after an impasse has occurred. While the WERC has not ruled on the question, the private sector precedents make it conceivable that the WERC could

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45. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

46. *Alameda Bus Lines, Inc.*, 333 F.2d 729, 56 LRRM 2548 (1st Cir. 1964); *Eddie's Chop Shop*, 165 NLRB 861, 65 LRRM 1408 (1967).

find the employer to be bargaining in bad faith and discriminating if special benefits and wages were offered to returning employees.

Special consideration must also be given to supervisory staff. During the strike, they will be required to work long hours under unpleasant and even dangerous conditions. They may be called upon to perform bargaining unit work as well as some of their regular management duties. Frequently, supervisory staff do not receive overtime premiums. Thus, during a strike, they may be living on the job site, working far more than eight hours a day and yet not receiving any additional pay or benefits. The effect of this condition on morale is obvious. Since high morale among supervisory staff is essential to the success of the employer's plan, additional salaries and benefits should be considered. While supervisory staff wages, benefits and terms of employment should be renewed annually as a matter of course, a strike may require special, temporary improvements for those people.

Supervisory staff will need additional police protection for themselves, their homes and their families. Like returning employees, provisions may have to be made for food and rest at the job site. In addition, extraordinary caution must be exercised in the use of equipment. Many supervisory personnel may be unfamiliar with the equipment they are assigned to use. The equipment may be sabotaged or may suffer from lack of maintenance. During the strike, rigid safety precautions must be in effect to avoid injury to the supervisors or the public.

The plans for continuing services should include not only personnel problems which might arise but also material, insurance and communications problems. Arrangements must be made with suppliers to insure an adequate flow of material through the picket lines. County contracts with suppliers and others should be examined to determine whether the county can fulfill the contracts or can use supplies already ordered. Insurance policies should be examined to determine whether they cover accident, injury or destruction due to a strike. Finally, a strike headquarters should be established. This headquarters will be invaluable in coordinating news releases, providing rapid policy decisions and in maintaining liaison with all county officials. A strike committee consisting of the personnel director, police and fire chiefs, attorney, budget director and chairmen of essential committees should be formed to op-

erate the headquarters and to make rapid policy decisions for the employers.

### 5. Contracting Out

Where supervisory staff and returning employees are not numerous enough to complete essential tasks, private contractors may be used. In highway and street departments, this tactic is especially useful. Many service stations and private construction companies have equipment which can be used for snow removal purposes. The owner or employee of the owner will often operate the equipment. Aid from surrounding cities and counties may also be an alternative. Special protection should be provided for contractors since they are otherwise vulnerable to sabotage, threats and vandalism. While this alternative may be expensive, it allows the employer to meet emergencies, such as a snow fall, with less inconvenience to the public.

### 6. Injunctive Relief

The injunction is the most widely discussed method for combating serious public employee strikes. Employers have found that this method often provides quick relief and leaves fewer after-effects than other alternatives. Since neither strikes nor strike threats are prohibited practices under Wisconsin Statutes section 111.70(3)(b)<sup>47</sup> the employer's main legal weapon for countering a strike is the injunction. Several factors must be weighed, however, before a public employer decides to seek injunctive relief. It must be realized that the injunction will not settle the strike. The basic issues which caused the strike will remain unsettled even after a successful injunction. Ill will arising from the injunction proceedings and the injunction itself may make agreement on those issues more remote. Furthermore, the union may be forced to respond to the injunction by maintaining a rigid position at the bargaining table. By this means, it can save face with its members who may see the injunction as breaking the strike and the union. Finally, private sector unions may be motivated to actively support the

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47. Wauwatosa School Board, WERC Dec. No. 8636 (7/68), Brown County WERC Dec. No. 9537 (3/70). However, where a striking union coerces or restrains employee rights, granted under Wis. STAT. § 111.70(2), it has committed a prohibited practice. Union sponsored strikes which result in coercion of such employee rights would be subject to a WERC injunction.

strikers by their traditional opposition to strike injunctions.

The employer must also consider the effect of a denial of injunctive relief. Injunctions are by no means automatic. Indeed, it is common for the judge to order extensive bargaining and mediation before permanent relief is granted. If, as a result of this forced bargaining, a settlement is not reached, the employer cannot afford to lose the injunction. An unsuccessful attempt to obtain an injunction will strengthen union morale. Without the threat of an injunction, the union's bargaining team can afford to take a more rigid position. Even if an injunction is granted, the court order must be enforced.<sup>48</sup> Striking employees may refuse to obey the order and police may hesitate to prosecute violations of the order. Even if the injunction is vigorously enforced, the arrest of striking employees may heighten community tensions.

Numerous court decisions have held that strikes by public employees are illegal and may be enjoined.<sup>49</sup> The rationale for these decisions lies in the unique responsibilities of government and government employees. Public employee strikes have been seen as an attack upon governmental authority. In *Norwalk Teachers Assoc. v. Board of Education*,<sup>50</sup> the Connecticut Supreme Court stated:

In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. A government so created and empowered must employ people to carry on its task. Those people are

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48. For background on the extent to which employees and unions can be fined and contained, see *Kenosha Unified School District No. 1 v. Kenosha Education Association*, 00 Wis.2d 000, 000 N.W.2d 000 (1975). For further background on the problem of service of the order for temporary injunction, see *Joint School District No. 1, Wisconsin Rapids v. Wisconsin Rapids Education Association*, 00 Wis.2d 000, 000 N.W.2d 000 (1975).

49. *Board of Education of Martins Ferry City School Dist. v. Ohio Education Assoc.*, 13 Ohio Misc. 308, 235 N.E.2d 538 (1967); *Board of Education of City of New York v. Shanker*, 283 N.Y.S.2d 548 (N.Y. 1967), *aff'd*, 286 N.Y.S.2d 453; *Pinellas County Classroom Teachers Assoc. v. Board of Public Instruction*, 214 So.2d 34 (Fla. 1968); *Arizona Board of Regents v. Communications Workers of America*, 661 CCH Lab. Cas. No. 52159 (Ariz. Sup. Ct. 1969); *Anderson Federation of Teachers v. School Dist. of Anderson*, 252 Ind. 558, 251 N.E.2d 15 (1969) and cases cited therein. For a more extensive discussion of this topic, see MOBERLY AND MULCAHY, *PUBLIC EMPLOYMENT LABOR RELATIONS* 103-22 (State Bar of Wisconsin, 1974).

50. 138 Conn. 269, 83 A.2d 482 (1951).

agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying they can deny the authority of government and contravene the public welfare.<sup>51</sup>

Other courts have emphasized the danger of governmental paralysis which is posed by public employee strikes. In *Board of Education of City of New York v. Shanker*,<sup>52</sup> the court in granting an injunction against striking teachers quoted approvingly from former Governor Dewey that:

Every liberty enjoyed in this Nation exists because it is protected by a government which functions uninterruptedly. The paralysis of any portion of government could quickly lead to the paralysis of all society. Paralysis of government is anarchy and in anarchy, liberties become useless.<sup>53</sup>

Public employee strikes have been enjoined merely on the ground they are illegal. Under such precedents, no showing of irreparable injury has been required. In *University of Wisconsin v. The Teaching Assistants Association*,<sup>54</sup> the court found that although the university had made a sufficient showing of irreparable injury, an injunction against striking teaching assistants was proper based solely upon their illegal strike. The decision of the Wisconsin Supreme Court in *International Union UAWF of L. Local 232 v. WERB*,<sup>55</sup> appeared to support this position. The court stated:

If a conspiracy to do a criminal act can be enjoined, so may a conspiracy to do an illegal act not criminal. All that is essential to support injunctive relief is unlawfulness.<sup>56</sup>

In a recent decision, however, the Wisconsin Supreme Court held that public employee strikes should not be enjoined solely on the basis of their illegality. In *Joint School District*

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51. *Id.* at \_\_\_\_, 83 A.2d at 485.

52. 283 N.Y.S.2d 548, 66 LRRM 2308 (1967).

53. *Id.* at 552-53, 66 LRRM 2314. See also *Anderson Federation of Teachers v. School Dist. of Anderson*, 250 Wis. 550, 27 N.W.2d 875 (1947).

54. *University of Wisconsin v. The Teaching Assistants Association*, Civil No. 130-095 (Dane County Circuit Court-1970), 74 LRRM 2052.

55. 250 Wis. 550, 27 N.W.2d 875 (1945).

56. *Id.* at 563, 27 N.W.2d at 881. See also *UAW Local 806 v. WERB*, 250 Wis. 570, 27 N.W.2d 885 (1946).

*No. 1, Wisconsin Rapids v. Wisconsin Rapids Education Association*,<sup>57</sup> the Wisconsin Supreme Court held that under the statutory authority for the issuance of temporary injunction:<sup>58</sup>

The key prerequisite to injunctive relief—irreparable harm—remains, and a court should not restrain illegal acts merely because they are illegal unless the injury sought to be avoided is actually threatened or has occurred.<sup>59</sup>

The court's decision in the *Wisconsin Rapids* case is based upon its finding that injunctive relief should be a last resort in settling a public sector labor dispute. The granting of injunctive relief based solely on the illegality of a public employees' strike would, the court indicated, make injunctions too simple a remedy for the public employer. Easily available injunctive relief, the court felt, would also restrict the effectiveness of mediation and fact finding set forth in Wisconsin Statutes section 111.70(4)(c) and could cause continuing ill will to develop between the employer and employees.

The *Wisconsin Rapids* decision will require public employers to show in many cases that the illegal strike has caused irreparable harm or that such irreparable harm is imminent or threatened. Whether or not the employer has met this burden will be determined by the trial court and will not be upset unless an abuse of discretion is shown. The test for abuse of discretion which the court applied in the *Wisconsin Rapids* case is that contained in *McCleary v. State*.<sup>60</sup> In the *McCleary* decision it also found that an abuse of discretion could occur when:

1. The trial judge fails to consider factors relevant to a decision;
2. The trial judge considers irrelevant or improper facts in reaching a decision;
3. The trial judge places too much weight on one factor in reaching a decision.

The relevant factors and weights to be given each factor must be determined by the circumstances of each case.<sup>61</sup>

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57. 70 Wis. 2d 292, \_\_\_\_ N.W.2d \_\_\_\_ (1975).

58. WIS. STAT. § 268.02(1) (1973).

59. 70 Wis. 2d at 311, \_\_\_\_ N.W.2d at \_\_\_\_.

60. 49 Wis. 2d 263, 182 N.W.2d 512 (1971).

61. *Id.* at 277, 182 N.W.2d at 519.



The Wisconsin Supreme Court upheld the trial judge's injunction in the *Wisconsin Rapids* case where the following factors had been considered: (1) the illegal nature of the strike; (2) the inability of the board to operate the school system as required by statute and its responsibility to the taxpayers; (3) the inability of students to obtain public education; (4) the possible loss of state aid; (5) the inability of parents to comply with their statutory responsibility to educate their children; and (6) the cancellation of school activities.

While a hearing on irreparable harm will be required under the *Wisconsin Rapids* decision before injunctive relief is made available for teacher, clerical and construction employee strikes, the court has indicated that in some instances the harm to public safety threatened by a strike may be so immediate and serious that a hearing would be unnecessary. Specifically, the court stated:

While the potential for immediate and serious harm to public health and safety is very real in a case of strikes by policemen, firemen and to a lesser extent sanitation workers, it is not critical where, for example, the strike is one by teachers, clerical employees or construction workers and others. We conclude in this case that immediate and serious harm to public health and safety was not apparent and that an injunction should issue only after a showing of irreparable harm dependent upon the facts and circumstances as shown in the hearing.<sup>62</sup>

Where, as in policemen and firemen's strikes the potential for harm is apparent, injunctive relief may be more readily available.

Even before the decision in *Wisconsin Rapids*, Wisconsin courts have required, in several instances, a showing of irreparable harm before granting injunctive relief. In *City of West Allis v. West Allis-West Milwaukee Education Association*,<sup>63</sup> a request for an *ex parte* restraining order and later a temporary injunction against striking teachers was denied on grounds that the city had failed to show any violence or disruption of municipal affairs. In *Kenosha Unified School Dist. No. 1 v. Kenosha Education Assoc.*,<sup>64</sup> the court established four grounds for tem-

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62. 70 Wis. 2d at 312, \_\_\_\_ N.W.2d at \_\_\_\_.

63. Civil No. 386-591 (Milwaukee County Circuit Court 1971).

64. Civil No. 23-700 (Kenosha County Court 1972).

porary relief. After finding that (1) an illegal strike had occurred, (2) that irreparable damage was resulting, (3) that the school district had no adequate legal remedy, and (4) that the city's request for injunctive relief had a likelihood of success, the court granted the restraining order.

Since some Wisconsin courts have already required the showing of irreparable harm as a basis for granting injunctive relief from a teacher strike, the *Wisconsin Rapids* decision may have a minor effect upon Wisconsin school boards and education associations. Furthermore, since extensive negotiations ending in mediation or fact finding have usually occurred before a public employer has sought injunctive relief, the *Wisconsin Rapids* decision may not greatly change the practices of public employers. The greatest impact of the decision would appear to lie with clerical, custodial, street and highway employees where standards for determining irreparable harm remain to be established.

Recently, courts in other jurisdictions have discussed the standard of irreparable harm as it applies in teachers' strikes. In *School Dist. of City of Holland v. Holland Education Assoc.*,<sup>65</sup> the court overturned an injunction against striking teachers. While the court upheld the validity of the state's no-strike law, it held:

. . . [I]t is insufficient merely to show that a concert of prohibited action by public employees has taken place and that "ipso facto" such a showing justifies injunctive relief. We so hold because it is basically contrary to public policy in this state to issue injunctions in labor disputes absent a showing of violence, irreparable injury or breach of the peace.<sup>66</sup>

The court concluded that the existence of an illegal strike and the closing of schools as a result of that strike were not adequate to justify injunctive relief. The case was remanded so that further testimony could be taken on the need for an injunction and on the extent to which the school board had engaged in good faith bargaining.

In cases similar to the *Holland* decision, courts in New Hampshire and Rhode Island refused to uphold temporary injunctions without a showing of good faith bargaining or irrepar-

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65. 380 Mich. 314, 157 N.W.2d 506 (1968).

66. *Id.* —, 157 N.W.2d at 210.

able harm. In *Timberlane School District v. Timberlane Education Assoc.*,<sup>67</sup> the plaintiff school district had rejected requests for mediation and sought injunctive relief instead. The court observed that the association had no means for compelling the school board to bargain in good faith except through an illegal strike. The court concluded that the issuance of automatic injunctions would be detrimental to the smooth operation of collective bargaining since it would reduce the pressures upon the board to bargain in good faith except through an illegal strike. In *School Committee of the Town of Westerly v. Westerly Teaching Assoc.*,<sup>68</sup> the Rhode Island court required proof of irreparable harm before allowing injunctive relief. The mere fact that public schools were closed was held to be inadequate to meet this standard. As in the *Timberlane* case, the court was concerned that by issuing automatic injunctions, it would become a coercive force at the bargaining table, thus undermining the role of collective bargaining.

The *Holland*, *Timberlane* and *Westerly* decisions have been criticized for placing too great a burden upon the public employer seeking injunctive relief. In *State v. Delaware Educational Assoc.*,<sup>69</sup> the court criticized these decisions for requiring a ruling on the employer's good faith bargaining before an injunction would be issued. The court stated:

It is not even generally an answer to say that the public employer is violating the law in some respect. Although one might imagine the case where equitable relief should be denied because of some unclean action by the public employer, the normal response to illegal activity by the public employer should be a legal action to compel the public employee to obey the law.<sup>70</sup>

This action might consist of a charge before the state employment relations board or a writ of mandamus. The Delaware court found further grounds for criticism in the application of "irreparable harm" by the courts in *Holland*, *Timberlane* and *Westerly*. The court stated:

The second policy ground gleaned from the cases cited above suggests the harm caused by a strike is not of sufficient

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67. 87 LRRM 2015 (N.H. 1974).

68. 87 LRRM 2567 (R.I. 1973).

69. 87 LRRM 2721 (Del. 1974).

70. *Id.* at 2726.

significance to justify judicial interference and so suggesting the three decisions simply misunderstand the nature of irreparable harm. Irreparable harm does not depend on a catastrophe or on violence or on an epidemic. Irreparable harm depends on interference with a legal right and should be judged by traditional equitable principles applicable in all cases for preliminary relief. Generally, irreparable harm exists when the injury cannot be adequately compensated in damages. It is not necessary that the injury be beyond the possibility of repair by money compensation, but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice.<sup>71</sup>

Public employees' unions have countered requests for injunctive relief with a variety of statutory and constitutional arguments. Except for the rationale accepted by *Holland* and *Timberlane*, these arguments have been largely ineffective. Most widespread of the statutory arguments is the argument that "little Norris-LaGuardia"<sup>72</sup> statutes prohibit the court from issuing an injunction. In Wisconsin this argument was rejected in *University of Wisconsin v. The Teaching Assistants Association*, where it was held that: "Conditions imposed on enjoining otherwise lawful activities are not helpful in deciding the tests to be applied where the activity concerned is illegal per se."<sup>73</sup>

The position taken by the circuit court in *University of Wisconsin v. The Teaching Assistants Association* was upheld by the Wisconsin Supreme Court in the *Wisconsin Rapids* decision.<sup>74</sup> Relying on the weight of federal and state decisions which permit injunctive relief for public employers, the Wisconsin Supreme Court held that the State's "little Norris-LaGuardia act" must be restricted to those situations falling specifically within its terms. The fact that the act does not specifically apply to public employers combined with the fact that Wisconsin has other statutory provisions specifically applicable to public employment, led the court to conclude that the

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71. *Id.* at 2725.

72. See WIS. STAT. § 103.56 (1973) for illustration of a "little Norris-LaGuardia" act.

73. *University of Wisconsin v. The Teaching Assistants Assoc.*, Civil No. 130-095 (Dane County Circuit Court, 1970), 74 LRRM 2050.

74. 70 Wis. 2d 292, \_\_\_\_ N.W.2d \_\_\_\_ (1975).

"little Norris-LaGuardia act" was not applicable to public employment.<sup>75</sup>

Other jurisdictions have similarly limited "little Norris-LaGuardia acts".<sup>76</sup> The position taken by these courts is strengthened by the precedent set in *United States v. United Mine Workers*,<sup>77</sup> which held that the federal Norris-LaGuardia Act did not apply to federal employees. The Supreme Court based its decision upon the rule that: ". . . [S]tatutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."<sup>78</sup> The Court reasoned that in the absence of a specific incorporation of federal employees in the Norris-LaGuardia Act, it could not be inferred that such employees were included.

In some jurisdictions, "little Norris-LaGuardia" statutes have been applied to public employees. The *Holland* decision discussed above gave weight to the public policy against injunctions established by a "little Norris-LaGuardia" act. In Illinois it has been held that an anti-injunction statute will not apply where a specific constitutional duty to perform is imposed. Thus, since the state constitution established the duty to provide public schools, teacher strikes were enjoined.<sup>79</sup> Where, as in the case of hospitals and institutions, no specific constitutional requirement is imposed upon the public employer, the anti-injunction statute has been given effect.<sup>80</sup>

Constitutional issues have also been raised by unions seeking to defeat an injunction. Foremost of these is an argument based upon Fourteenth Amendment rights to equal protection of the laws. The argument is based upon a comparison between

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75. *Id.* at 307, \_\_\_\_ N.W.2d at \_\_\_\_.

76. *Anderson Federation of Teachers Local 519 v. School Dist. of Anderson*, 250 Wis. 550, 27 N.W.2d 875 (1947); *Board of Education v. Montgomery County Education Assoc.*, 67 LRRM 2745 (Md. Cir. Ct. 1968); *Delaware River & Bay Authority v. International Organization of Masters, Mates & Pilots*, 45 N.J. 138, 211 A.2d 789 (1965); *Hansen v. Commonwealth*, 344 Mass. 214, 181 N.E.2d 843 (1962); *New Jersey Turnpike Authority v. AFSCME Local 1511*, 83 N.J. Super. 389, 200 A.2d 134 (1964); *Port of Seattle v. ILWU* 52 Wash. 2d 317, 324 P.2d 1099 (1958); *Rankin v. Shanker*, 23 N.Y.2d 111, 242 N.E.2d 802, 295 N.Y.S.2d 625 (1968).

77. 330 U.S. 258 (1947).

78. *Id.* at 272.

79. *Board of Education v. Redding*, 32 Ill.2d 567, 207 N.E.2d 427 (1965); *Allen v. Maueurer*, 6 Ill. App. 3d 633, 286 N.E.2d 135 (1972).

80. *Peters v. South Chicago Community Hospital*, 44 Ill. 2d 22, 253 N.E.2d 375 (1969); *County of Peoria v. Benedict*, 47 Ill. 2d 166, 265 N.E.2d 141 (1970).

public sector employees who can strike and private sector employees who cannot. It is argued that the distinction serves no rational purpose and must be struck down as violative of the Fourteenth Amendment, and since the strike ban is allegedly unconstitutional, the strike itself cannot be enjoined.

This argument has recently been rejected by the Wisconsin Supreme Court in *Hortonville Education Assoc. v. Hortonville Joint School Dist.*<sup>81</sup> The court found several distinctions between public and private sector employees. These included the fact that the public employer is entitled to a higher level of devotion from its employees, that employees have opportunities to achieve their objectives through the legislative process, and that the lack of market pressures upon the governmental employer make it particularly vulnerable to strikes. Since the right to strike is not constitutionally protected and is not a fundamental right, no violation of the Fourteenth Amendment occurs so long as the distinctive treatment of public employees is not arbitrary.<sup>82</sup> Based upon the above distinctions, the court found that the no-strike statute did not violate the Fourteenth Amendment.

Constitutional arguments have also been raised under the due process clause of the Fourteenth Amendment and under the Thirteenth Amendment. In *United Federation of Postal Clerks v. Blount*,<sup>83</sup> the court rejected the argument that the federal statute prohibiting strikes among federal employees was vague and overbroad. The court held that it had broad latitude to construe a statute in terms that would save it from vagueness and overbreadth. A limited definition of "striking" was adopted by the court and the union's Fourteenth Amendment argument was denied. Unions have also sought to avoid injunctions under the argument that the Thirteenth Amendment's prohibition on involuntary servitude invalidates state no-strike laws. Courts have, however, drawn a distinction between a prohibition on the right to strike and a prohibition on quitting employment. A strike prohibition has been held to offer employees the opportunity of returning to work or resign-

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81. 66 Wis. 2d 469, 225 N.W.2d 658 (1975).

82. *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C., 1971), *aff'd*, 404 U.S. 802 (1971). See also *WERB v. AASERMC*, Div. 998, 257 Wis. 43, 42 N.W.2d 471 (1950).

83. *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C. 1971), *aff'd*, 404 U.S. 802 (1971).

ing.<sup>84</sup> In a Wisconsin case involving the private sector, it was held that restrictions on the right to strike did not violate the Thirteenth Amendment. The court stated that, while employees had the right to cease work, when such quitting was part of an unlawful plan it was enjoinable.<sup>85</sup>

While injunctive relief is generally available to public employers, recent cases indicate that the employers should be prepared to present substantial evidence of irreparable harm and of good faith bargaining. In many instances, these standards can be met. Police, fire and sanitation strikes are obvious examples of immediate and irreparable harm. Among other employees, mainly clerical type positions, this standard may be more difficult to achieve. Frequently, judges are not only requiring irreparable harm and good faith bargaining, but are requiring both parties to attend extensive mediation sessions before action is taken on the injunction. In such cases, injunctive relief is granted only as a last alternative. Judges may also require continued and extensive good faith bargaining as a condition for maintaining the injunction. Both of these tactics reflect the court's realization that injunctive relief will not settle the dispute.

## 7. Temporary and Permanent Replacements

The most drastic means by which a public employer may continue public services is through the hiring of replacements. The Wisconsin Supreme Court has held that a public employer is not prohibited from hiring permanent replacement employees.<sup>86</sup> Caution must be exercised, however, when, as part of a replacement program, the employees with individual contracts, tenure, or property interests in their positions are fired.<sup>87</sup> Caution must also be taken to avoid violation of Wisconsin Statutes section 103.43,<sup>88</sup> which provides that employment advertisements must state that a labor dispute is in progress.

The hiring of permanent replacement employees will cause

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84. *Pinellas County Teachers Assoc. v. Board of Public Education of Pinellas County*, 214 So. 2d 34 (Fla 1968).

85. *UAW v. WERB*, 250 Wis. 550, 27 N.W.2d 875 (1947). *See also* *In re Block*, 50 N.J. 494, 236 A.2d 592 (1967).

86. *Hortonville Education Association v. Hortonville Joint School Dist.*, 66 Wis. 2d 469, 225 N.W.2d 658 (1975).

87. *Id.*

88. Wis. STAT. § 103.43 (1973).

the strike to become less controllable. Violence and lasting hostility will arise. The divisions within the community which will follow from this action may last for years.

The hiring of permanent replacement employees makes a negotiated settlement virtually impossible. No union can agree to a settlement which terminates the employment of its members. The employer, on the other hand, becomes obligated to retain the replacement employees. The only alternatives are capitulation by the union or featherbedding by the employer.

The hiring of temporary replacements is less drastic. If the need for services is great and it is well publicized that the replacements are only temporary, such a plan can be successful. Frequently, the most difficult problem with this tactic is an inability to find temporary replacements. Few people will risk the harassment of crossing picket lines unless guaranteed long-term employment. In a few instances, temporary replacements may become available. Where, as in the case of hospitals and institutions, a strike will place friends and relatives in immediate danger, some voluntary, unskilled aid may be available. Yet, even here, qualified replacements must be found and trained. As in the case of supervisory staff, extra precautions must be made in training and supervising temporary replacements to avoid safety hazards.

#### CONCLUSION: RESOLUTION OF THE PROBLEM

The public employer has numerous alternatives to reduce the effects of job actions, picketing and strikes. No one alternative can be viewed as a panacea. Only after local conditions have been thoroughly considered can some alternatives be selected over others. Even then, the alternatives will not settle the dispute. These alternatives may reduce or eliminate the dispute's symptoms but do not resolve the basic disagreements which give rise to the dispute. When both parties develop a posture of mutual trust and respect, many areas of dispute are quickly resolved. Pressure techniques applied by either side will not provide meaningful and long range solutions to labor problems. These problems must be settled on terms acceptable to both sides. In the final analysis, only a negotiated settlement can insure the continuing labor peace which should be a prime goal of both labor and management.



### Appendix A

The following is an ordinance based upon the City of Wauwatosa Residential Picketing Ordinance, upheld in *City of Wauwatosa v. King*, 49 Wis. 2d 398, 182 N.W.2d 530 (1970).

7.52.010 Declaration. It is hereby declared that the protection and preservation of the home is the keystone of democratic government; that the public health and welfare and the good order of the community require that members of the community enjoy in their homes and dwellings the feeling of well-being and tranquility, and privacy and when absent from their homes and dwellings, carry with them the sense of security inherent in the assurance that they may return to the enjoyment of their homes and dwellings; that the practice of picketing before or about such residences and dwellings causes emotional disturbance and distress to occupants; obstructs and interferes with the free use of public sidewalks and public ways of travel; that such practice has as its object the harassing of such occupants; and without resort to such practices full opportunity exists, and under the terms and provisions of this ordinance will continue to exist for the exercise of freedom of speech and other constitutional rights; and that the provisions hereinafter enacted are necessary for the public interest to avoid the detrimental results herein set forth and are enacted by the Common Council of the City of Wauwatosa pursuant to the provisions of Section 62.11(5) of the Wisconsin Statutes. . . .

7.52.020 Picketing residence or dwelling unlawful. It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual. Nothing herein shall be deemed to prohibit (1) picketing in any lawful manner during a labor dispute, or (2) the holding of a meeting or assembly on any premises commonly used for the discussion of subjects of general public interest.